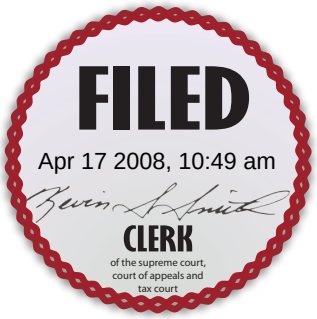

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IN THE
COURT OF APPEALS OF INDIANA

NORMAN LIPP,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-0711-EX-927
	)	
GIRL SCOUTS OF AMERICA,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Cause Nos. C-152031 and C-182387

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Carolyn Lipp appeals the decision of the Worker's Compensation Board that third-party settlements terminated the Girl Scouts' liability for death benefits and burial expenses. We affirm.

FACTS AND PROCEDURAL HISTORY

Carolyn's husband, Norman, was exposed to carbon monoxide while working for the Girl Scouts in 1998. This exposure resulted in cerebral anoxia and permanent brain damage. Norman and Carolyn filed a personal injury case against several third parties. They eventually settled with all the third parties, and their case was dismissed with prejudice on October 17, 2003.

Norman had also filed a worker's compensation claim. The Girl Scouts moved to dismiss his claim because of the third party settlements. On April 18, 2005, Hearing Member Susan M. Severtson ordered:

> [Norman's] claim for benefits is precluded by his third-party case settlement(s). . . . [Norman's] request for a pro rata contribution of all costs and reasonably necessary expenses for the third-party claim prosecution remains as a viable claim to be determined by the Board.

(Appellant's App. at 72.)

Norman passed away in August of 2004. On August 11, 2006, Carolyn filed a worker's compensation claim alleging Norman had died from the carbon monoxide exposure and seeking death benefits and burial expenses. The Girl Scouts argued the third party settlements terminated Carolyn's claim also. On April 26, 2007, Hearing Member James Dowling determined Carolyn's claim "expired no later than the point when the third-party claim was finally concluded and dismissed, October 17, 2003," and

the Girl Scouts "would be responsible for, at most, some share of the expenses incurred by Norman Lipp or his dependants in prosecuting the third-party claims." (*Id*. at 9.) On September 25, 2007, the Worker's Compensation Board adopted Dowling's decision.

DISCUSSION AND DECISION

Our standard for reviewing a decision by the Board is well settled:

> This court is bound by the factual determinations of the Board, and we will not disturb them unless the evidence is undisputed and leads inescapably to a contrary result. Furthermore, it is the claimant's burden to prove a right to compensation under the Worker's Compensation Act. In reviewing a decision made by the Board, we will neither reweigh the evidence nor assess the credibility of the witnesses. While this court is not bound by the Board's interpretations of law, we will reverse the Board's decision only if the Board incorrectly interpreted the Act.

Danielson v. Pratt Indus., Inc., 846 N.E.2d 244, 247 (Ind. Ct. App. 2006) (citations omitted).

Carolyn argues the Board misinterpreted Ind. Code § 22-3-2-13, which provides in relevant part:

> Whenever an *injury or death, for which compensation is payable* under chapters 2 through 6 of this article shall have been sustained under circumstances *creating in some other person than the employer . . . a legal liability to pay damages in respect thereto*, the injured employee, or his dependents, in case of death, may commence legal proceedings against the other person to recover damages notwithstanding the employer's . . . liability to pay compensation. . . .
>
> In the event the injured employee or his dependents, not having received compensation or medical, surgical, hospital or nurses' services and supplies or death benefits from the employer . . . , shall procure a judgment against the other party for injury or death . . . , or if settlement is made with the other person either with or without suit, then the employer . . . shall have no liability for payment of compensation or for payment of medical, surgical, hospital or nurses' services and supplies or death benefits whatsoever, whether or not one (1) or all of the dependents are entitled to share in the proceeds of settlement or recovery and whether or not one (1)

> or all of the dependents could have maintained the action or claim for wrongful death.

(emphasis added.)

Carolyn argues:

> . . . the statute only applies to (1) a worker's compensation claim for benefits "for which compensation *is* payable," where (2) a third party is liable for damages "with respect thereto." At the time of the third party settlements, Carolyn Lipp did not have a worker's compensation claim for which compensation was payable, and no third party was liable for death benefits, burial expenses, or wrongful death because Norman Lipp was alive. Thus, the statute does not apply to her right to later recover death benefits and burial expenses under the Worker's Compensation Act.

(Appellant's Br. at 7) (emphasis in original).

The Girl Scouts direct us to *Bebout v. F.L. Mendez & Co.*, 37 N.E.2d 690 (Ind. Ct. App. 1941). While working for F.L. Mendez & Co., Reu Bebout was in a collision with Eugene Clark. Reu settled with Clark and executed a release of "any and all claims arising out of" the accident. *Id*. at 691. Reu later died from the injuries he sustained during the accident. His widow, Marie Bebout, filed a claim for death benefits.

We held Marie was not entitled to benefits because Reu's settlement was full satisfaction for his injuries, and the employer would be unable to seek subrogation from Clark:

> Following the injury, the said Reu M. Bebout elected to pursue his remedy at law, and as a result of such election, a full and complete settlement was made with him by the tort-feasor for all the injuries which he sustained, as a result of the tort. Upon payment being made, the said Reu M. Bebout had no further cause of action against the wrongdoer, and he had no further claim against his employer which he could assert. Neither did his widow, the appellant herein, have any claim which she could assert against Eugene B. Clark. The fact that her husband died, as a result of the injury sustained by him, did not give to her a cause of action, even though her husband's life

> was shortened, as a result of the injuries sustained. The settlement . . . made [Reu] whole and left his dependents no right, if any had been violated, for which they were not compensated.
>
> * * * * *
>
> If the appellee pays the appellant's claim, it is clear that the appellee cannot seek reimbursement from Eugene B. Clark. The liability of Clark has been fully paid and satisfied. No other or different claim arising out of this tort can be asserted against him. He has paid all claims which the injured employee or his dependents could assert against him.

Id. at 691-92. Because an action for wrongful death may be maintained only "under circumstances where the deceased could have maintained such action had he lived," *id*. at 693, and Reu had executed a full release, Marie had no claim against Clark. The settlement was full compensation for Reu's injuries, and Marie could not recover again from the employer. *Id*.

Carolyn's case is similar to *Bebout*.[1] Norman settled his claims, so Carolyn could not re-assert them as a wrongful death action. Carolyn settled her independent claim for loss of consortium. Norman and Carolyn accepted the settlements as full compensation for damages arising from Norman's injuries.[2] The Girl Scouts would be unable to recover from the third parties any benefits paid to Carolyn.

Carolyn argues *Bebout* does not control because that case did not interpret the phrase "injury or death, for which compensation is payable" in Ind. Code § 22-3-2-13.

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[1] Although *Bebout* interprets a predecessor statute to Ind. Code § 22-3-2-13, the decision is on point, and we decline to adopt the United States Supreme Court's interpretation of the Longshore and Harbor Workers' Compensation Act in *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248 (1997), as Carolyn urges.

[2] In *Bebout*, we noted Bebout released any and all claims arising from the accident. Carolyn argues no claim based on Norman's death had accrued when they entered the settlements, but that does not mean they could not have released such a claim. She does not argue, nor does the record indicate, that they executed anything less than a full release or that any claims against the third parties still exist.

However, nothing in *Bebout* is inconsistent with this phrase. Norman had the option of pursuing his remedies under the Worker's Compensation Act or suing the third parties who caused his injuries. He chose the latter, and the second paragraph of Ind. Code § 22-3-2-13 controls:

> In the event the injured employee or his dependents, not having received compensation or medical, surgical, hospital or nurses' services and supplies or death benefits from the employer . . . , shall procure a judgment against the other party for injury or death . . . , or if settlement is made with the other person either with or without suit, then the employer . . . *shall have no liability for payment of compensation or for payment of medical, surgical, hospital or nurses' services and supplies or death benefits whatsoever, whether or not one (1) or all of the dependents are entitled to share in the proceeds of settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death*.

(emphasis added.) In other words, because Norman accepted third-party settlements, the Girl Scouts' liability terminated without regard for Carolyn's right to benefits arising out of the same injuries. This result is not unfair where, as here, Norman and Carolyn received full compensation during Norman's life, and it is consistent with the purpose of the statute. *See Ansert Mechanical Contractors, Inc. v. Ansert*, 690 N.E.2d 305, 307 (Ind. Ct. App. 1997) (The purpose of I.C. § 22-3-2-13 is to prevent injured employees from settling with a third party, thereby cutting off the employer's subrogation rights.). Therefore, we affirm the Board's decision.

Affirmed.

RILEY, J., and KIRSCH, J., concur.